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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. —

BALTIMORE STEAMSHIP COMPANY AND UNITED States Shipping Board Emergency Fleet Corporation, Petitioners

v.

VERNON PHILLIPS, AN INFANT, BY VERNON PHILLIPS, his guardian ad litem

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of petitioners, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause on November 16, 1925.

STATEMENT OF THE CASE

This petition involves a situation where an injured seaman instead of applying for and receiving compensation under the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, to which he was entitled (34 Op. Atty. Gen. 363), brought suit to recover for personal injury.

After judgment against him, from which no appeal was taken, he brought a second suit to recover for the same injury. The courts below refused to sustain a plea of *res judicata,* the Circuit Court of Appeals deciding that the different allegations of fault in the two suits set forth two different causes of action for the same injury.

On July 24, 1921, Vernon Phillips (Philipps), a seaman on board the steamship "West Cape," was working in hold No. 1 of the vessel. (R. 103.) While dunnage was being removed from the hold, a strongback (or beam) fell from the hatch and struck Phillips's left ankle, fracturing it. (R. 106, 190.)

Phillips filed a libel in admiralty in the United States District Court for the District of Maryland, against the United States of America, the United States Shipping Board Emergency Fleet Corporation, and the Baltimore Steamship Company. (R. 189.) He set forth his injury, alleging (R. 190)—

> that his injuries were caused by the negligence of the respondents in failing to provide him with a safe place in which to do the work required of him and in failing to use reasonable care to avoid striking him, and to the unseaworthiness and insufficiency of the gear and tackle employed on board said vessel,

and claimed $15,000 indemnity. By amendment he alleged (R. 193-4)—

> that the negligence claimed consists in the failure of the respondent, the United States

> of America, to provide a cleat or socket of the proper design and sufficient strength to support the strongback when one end of it was negligently knocked out of place by a load of dunnage being hoisted from the hold, further the officers of the steamship "West Cape" were incompetent, further that the respondents owe a special duty to Vernon L. Phillips, Jr., because of his youth and inexperience. And libellant claims, in the event that negligence is not established, for wages, maintenance, and cure.

Phillips testified at the trial of the case. (R. 123, et seq.) Judge Rose filed an opinion (286 Fed. 631) finding that libellant's ankle had been fractured and ultimately his left leg had been amputated above the knee; that there was nothing whatever the matter with the construction or design of the cleat or socket which held the strongback; that the injury was caused by the grossly negligent way in which the dunnage was taken out of the hold; but that the record did not show lack of due care in selecting competent officers. He concluded his opinion by saying (p. 633):

> In this case, one cannot help regretting that under the authorities it is not possible to hold somebody for the needless and irreparable injury done this youth.
>
> As the decisions stand, however, all that may be awarded him is the cost of his maintenance and cure, which upon the testimony the parties agree amounts to $500.

A decree was entered on February 19, 1923, reciting that respondents were not liable to libellant for full indemnity but only for maintenance and cure. (R. 187.) No appeal was taken and the decree was satisfied. (R. 200.)

Subsequently on May 22, 1923, and *before the time limit for appeal in the first suit to the Circuit Court of Appeals had expired,* Phillips commenced a second action at common law in the Supreme Court of the State of New York against petitioners who were two of the three respondents in the first suit; the third, the United States of America, was not joined herein. (R. 3.) The complaint alleged again that the strongback or beam fell upon him, alleged (R. 7)—

> That the injuries to the plaintiff were directly caused by the negligence of the defendants and of the officers and their seamen in their employ in their negligent and reckless control and operation of said vessel and of said winch and appliances on the said vessel and in their operation thereof, in their disregard of the rights, presence and safety of the plaintiff and in their failure to give warning to the plaintiff of the impending danger.

and claimed $100,000 indemnity. (R. 4–8.) The case was removed to the United States District Court for the Eastern District of New York, (R. 12 et seq.) The answers filed by the petitioners set up, among other defenses, that of *res judicata.* (R. 24, 31.)

Upon motion for judgment upon the pleadings, the defense of *res judicata* was sustained by Judge Inch. (R. 70–75.) Subsequently, after the decision of this Court in *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, Judge Inch reversed his previous decision and held that the matter was not *res judicata.* (R. 88–97.) The ground of this decision is not clear, but is apparently that since Judge Rose erred in not entertaining the same view of the modifications of the maritime law occasioned by Section 33 of the Merchant Marine Act (Act June 5, 1920, c. 250, 41 Stat. 1007) as explained by this Court in *Panama Railroad Co.* v. *Johnson,* Mr. Phillips, though claiming indemnity, had not had his day in court. Trial was then had upon substantially the same proofs as in the Baltimore suit; the record in the Baltimore suit was tendered in evidence by petitioners and rejected (R. 158 et seq.); exceptions were taken.[1] (R. 161 et seq.) The case was allowed to go to the jury, which brought in a verdict for $40,000 (R. 170) and judgment entered.

Upon writ of error from the Circuit Court of Appeals, the decision was affirmed upon other grounds. (R. 230.) The court, speaking through Judge Learned Hand, held that a suit for injuries from unseaworthy gear was upon a different cause of action from a suit for the same injuries from negligent use of seaworthy gear. He stated, with-

[1] The record in the Baltimore suit has been printed in the present Record (Exs. 1-6, R. 184–201), with the exception of the opinion of Judge Rose, which is reported in 286 Fed. 631, and the testimony (Ex. 7, R. 163, 164), which was before the Circuit Court of Appeals (R. 202) and has been filed with the Clerk of this Court.

out citing them, that cases may be found in agreement with, and contrary to, the proposition, but concluded that *Troxell* v. *Del., Lack. & West. R. R.*, 227 U. S. 434, supported the proposition.

Petitioners believe that *Troxell* v. *Del., Lack. & West. R. R.* does not support the decision of the Circuit Court of Appeals, as appears in the following brief. No other cases supporting the decision have been found. On the other hand there are decisions of the Circuit Courts of Appeals for the First and Ninth Circuits (*Columb* v. *Webster Manufacturing Co.*, C. C. A., 1st, 84 Fed. 592; *Miller* v. *Spokane International Ry. Co.*, C. C. A., 9th, 293 Fed. 748) as well as a strong body of law in the State courts, which are clearly contrary to the decision in the instant case. Judge Hand's opinion is confessedly searching for a correct rule. Other Circuit Courts of Appeal, in their search, have reached a contrary result.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals for the Second Circuit is in conflict with decisions of the Circuit Courts of Appeals for the First and Ninth Circuits, so that a review by this Court is necessary for uniformity of decision in the Federal courts.

2. The case, involving as it does the proper understanding of the decision of this Court in *Troxell* v. *Del., Lack. & West. R. R.*, is of great importance, not only to shipowners, but also to all employers and employees, whether suing in the

Federal or State courts. Employers are required to furnish a safe place to work and fellow employees not known to be incompetent, and many statutes have removed the defense of the fellow-servant rule. The great dissatisfaction with suits for personal injury of employees has been reflected in legislation, particularly in the form of Compensation Acts, designed to give relief to employees, including those in the status of Phillips, without the expense or uncertainties of litigation.

To those who, in spite of statutory relief, prefer litigation, and to the defendants in such suits, it is of the utmost importance to know what constitutes the cause of action, not only for the facilitation of the suit, but also in order that there may be a conclusion of suits. If, as the great weight of authority indicates, the cause of action is based upon the wrongful injury, then there can be only one suit in which all of the grounds of alleged wrongfulness must be tried. If, as the decision in the instant case holds, the cause of action is based upon the particular wrongfulness alleged by the pleadings, then there may be as many separate suits as the ingenuity of counsel may urge separately, although the concurrent breaches of duty combine to give rise to only one injury. Indeed, as pointed out by the Circuit Court of Appeals for the First Circuit in *Columb* v. *Webster Manufacturing Co.,* 84 Fed. 592 at page 595, it inevitably follows that there may be, in addition to separate suits, separate recoveries for the same injury, each based upon the separate breach of duty which may be pleaded.

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The particular importance of the decision in the instant case to shipowners, and to the Government as shipowner, is that the Circuit Court of Appeals for the Second Circuit handles by far the greatest volume of such cases. The decision, unless reversed, will operate as a precedent for the cases in that circuit. From the respect paid to its decisions by courts which deal less frequently with maritime cases, the decision may also establish a precedent elsewhere, so that, even though wrong, it will be much more difficult to overthrow at a later date.

A decision by this Court, deciding between the conflicting rules, will explain what constitutes a cause of action for personal injury and when such actions are concluded. By the closest of analogies, the decision will apply to all tort cases where an injury arises from a violation of one or more duties owed to the injured party. The case therefore probes to the fundamentals of the application of the doctrine of *res judicata* in tort litigation, and is therefore of great public importance.

3. The case involves the construction and application of Section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 988, 1007, and the Act of April 22, 1908, c. 149, 35 Stat. 65.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JANUARY, 1926.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals has not yet been reported. It will, however, be found on page 230 of the Record. The District Court's opinions are at pages 70 and 88 of the Record.

JURISDICTION OF THIS COURT

1. The judgment of the Circuit Court of Appeals was entered on November 16, 1925. (R. 239.)

2. Jurisdiction of this Court to review the case is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The facts have been stated above in the petition (pp. 1–6), to which reference is respectfully made.

SPECIFICATION OF ERROR TO BE URGED

The error assigned and intended to be urged is the failure to sustain the plea of *res judicata*.

SUMMARY OF THE ARGUMENT

I. *Columb* v. *Webster Manufacturing Co.* (C. C. A., 1st), 84 Fed. 592, and *Miller* v. *Spokane International Ry. Co.* (C. C. A., 9th), 293 Fed. 748, are in conflict with the decision of the Circuit Court of Appeals for the Second Circuit

II. *Troxell* v. *Del., Lack. & West. R. R.*, 227 U. S. 434, does not support the decision of the lower court

ARGUMENT

The statute which governs the right of Phillips to recover indemnity for his injury is Section 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1164, 1185, as amended by Section 33 of the Act of June 5, 1920, c. 250, 41 Stat. 988, 1007, which reads as follows:

> Section 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; * * *.

This Court considered and explained the statute in *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375.

It is believed that a comparison of the record in the Baltimore and New York cases will show that the same issues were raised by the pleadings and testimony. The New York case was decided upon the negligence of the officers, and Judge Rose made the same finding in the Baltimore case (286 Fed. at 633).

However, review by certiorari is not asked alone upon this narrow ground. ***Review, because of conflict of circuits and the great public interest, is asked upon the broad ground that Phillips had only one cause of action, namely, for the injuries suffered from the wrongful dropping of the strong-***

back upon his ankle. Whatever breaches of duty made the dropping " wrongful " are but the *media concludendi* which do not constitute different causes of action, as decided by this Court in *United States* v. *California & Oregon Land Co.,* 192 U. S. 355, 358:

> The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means, that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.
>
> It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi. Phosphate Sewage Co.* v. *Molleson,* 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1139; although in the same case on appeal Lord Blackburn seemed to doubt the proposition if the facts were known before. S. C., 4 App. Cas. 801, 820. But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can not even split up his claim. *Fetter* v. *Beale,* 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad,* 2 Allen, 331; Freeman, Judgments, 4th ed. Secs. 238, 241; and, *a fortiori,* he can not divide the grounds of recovery.

I

Columb v. _Webster Manufacturing Co._ (C. C. A., 1st), 84 Fed. 592, and _Miller_ v. _Spokane International Railway Co._ (C. C. A., 9th), 293 Fed. 748, are in conflict with the decision of the Circuit Court of Appeals for the Second Circuit

The relevant portion of Judge Hand's opinion is as follows (R. 236):

> In the case of a suit for personal injuries, it is indeed possible to regard the action as based alone upon the plaintiff's bodily injury. So viewed, a battery would be the same cause of action as an action on the case for unintentional injury. The question would be irrelevant whether the injury, in fact caused by the defendant, was intentional or careless. The material fact would be the injury itself and its causation by the defendant. History alone forbids such a view, though eventually the law may assume that form, 8 Harv. Law Review, 1.
>
> Nevertheless, among actions on the case it would still be possible to adopt the theory, somewhat mutilated to be sure, but consistent so far as it went. Confined to acts which were unintentional, the law might regard the injury and its causation as alone constituting the cause of action, treating as a variant, immaterial in the definition of the species, the kind of neglect which cut off the defendant's excuse that the injury was not intended. So viewed, it would be the same cause of action whether the defendant had installed unseaworthy gear, or had been careless in the use of seaworthy gear.

But a defendant's liability in such cases might depend upon a quite opposite notion; that is, that he owed a duty of care in the use of such gear as he installed and another duty to install seaworthy gear. In that view the cause of action would differ according as the plaintiff charged him with one or the other default, and a judgment on the one would not be a bar to the other. We concede that the law has not come to a definite conclusion between the two theories, and cases may be found taking either view, but obviously we are to be controlled by that taken by the Supreme Court so far as it has declared itself.

The nearest case is *Troxell* v. *D. L. & W. R. R. Co.*, 227 U. S. 434, which, we think, favors the plaintiff. Troxell's widow had sued the defendant alleging that it had failed to provide proper safety appliances under the Pennsylvania statute. She lost, and brought a second action based on the Employers' Liability Act for the negligence of the defendant's servants in handling its cars. The first judgment was held not to be a bar. The case may, it is true, be distinguished on the ground taken by Mr. Justice Lurton, that the parties were not the same, because in the second suit, the widow sued as administratrix. Yet the decision goes much further, because the court clearly held that it was one cause of action not to furnish safe cars and another to use safe cars carelessly.

It is not perfectly certain that, had the plaintiff in the first action relied upon the Employers' Liability Act, as she might (because that includes defective appliances), the result would have been the same. That is indeed the case at bar, since the Jones Act incorporates the Employers' Liability Act. But if we ignore the difficulty arising from the distinction in the plaintiff's persona, it appears to us that there could be no logical differences. If the "cause of action," as the defendants at bar must maintain, consists of the injury and its origin from the defendant in one way or another, it can not be a distinction that in Troxell's case the defendant's faults were defined in two statutes, while in the case at bar they are to be found in one. The crux of the question rests not in the sources of the faults, but whether the law regards them as constitutive or only regulative of the basis of recovery. No doubt that in the end is a conventional question, but then so is most of the law. Perhaps it would be practically better to insist that a person injured by another should bring forward at one time all the reasons why he should recover. Yet there is a clear difference between injuring an employee because of inattention in the conduct of one's work and because of failing to furnish proper tools. The difference appears to us at least, as substantial as between injuring him intentionally and unintentionally. It does not follow because such diverse situations may be divided, that a plaintiff may sever by sepa-

rate suits different acts of negligence in the conduct of the work. It is enough for the present that the Supreme Court has countenanced the severance here necessary.

The exclusion of the roll in the admiralty suit was proper after what we have said. No fact actually adjudicated in the suit was material to the disposition of the action. As an estoppel it was irrelevant; as a bar it was bad.

Judgment affirmed.

Leaving for the moment a discussion of the *Troxell case,* it is submitted that other Circuit Courts of Appeals have a contrary rule as to the nature of the cause of action.

In *Columb* v. *Webster Manufacturing Company,* (C. C. A., 1st) 84 Fed. 592, the plaintiff had brought an action against his employer in a State court to recover for injuries suffered because he was thrown into the river by the sudden giving away of a trestle, which he alleged was not a safe place to work because carelessly and negligently constructed. After judgment for the defendant, he brought a second action in the Federal court alleging that the trestle fell and "owing to the neglect of the defendant to provide safe and suitable safeguards, instrumentalities, and protection for and in the performance of said work, and owing to the neglect of defendant to provide safe, suitable, and competent servants and agents to assist the plaintiff in the performance of said work, the plaintiff

was precipitated into the said river," and was injured.

Thus, the first ground was failure to provide a safe place to work. The second ground was negligence of fellow servants known to the defendant employer to be incompetent. (Mere incompetency, without negligent acts, would be *injuria absque damno.*) If the opinion of Judge Hand is correct, these were two different causes of action. Yet the Circuit Court of Appeals for the First Circuit, in a clear and well reasoned opinion which has been cited many times with approval, held that the first suit to recover for the injury was *res judicata* of all grounds of recovery.

In *Miller* v. *Spokane International Railway Co.* (C. C. A. 9th), 293 Fed. 748, both suits considered therein were brought under the same two statutes, the Locomotive Boiler Inspection Act and the Federal Employers' Liability Act. (The latter of these is incorporated by Section 33 of the Merchant Marine Act, which is in question in the instant case.)

In the first suit the plaintiff alleged a violation of one rule in that the cab apron was not roughened and did not fit smoothly. In the second he alleged a violation of a different rule, in that the apron was too short, and claimed that these were separate torts (293 Fed. 749). The court held that judgment in the first suit was *res judicata* of all grounds for recovery for the injury, saying, at p. 750:

> It is the personal injury that is the gist of the action, and although negligence alleged

may have been caused by the omission to comply with one of several specific requirements which it was the duty of the carrier to do, nevertheless plaintiff had but one cause of action, and having selected one defect of several upon which he might have based his action, he cannot now bring another suit based upon another specific defect. In *Stark* v. *Starr*, 94 U. S. 477, 24 L. Ed. 276, the court said: "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

(2) We cannot find any solid ground upon which to except the present action from the principle stated. *Jenkins* v. *Atlantic Coast Line R. Co.*, (C. C.) 179 Fed. 535; *Clare* v. *New York & N. E. R. Co.*, 172 Mass. 211, 51 N. E. 1083.

The Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, provides, in Section 1:

> That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between

> the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Under the statute, failure on the part of a fellow servant to use due care toward the injured man, is, on the principle of *respondeat superior*, equally with defective appliances, an "omission to comply with one of several specific requirements which it was the duty of the carrier to do." The holding of the Circuit Court of Appeals for the Ninth Circuit in the *Miller* case that the plaintiff must allege in his suit for personal injury all of the various omissions to comply with the requirements of which he complains and that separate omissions do not constitute separate torts, is authority con-

trary to the holding in the instant case, that under the same statute (which has been incorporated in the Merchant Marine Act) failure to supply proper equipment gives rise to a different cause of action from negligent operation of the equipment, in both cases the injury being the same.

A large number of cases decided in the State courts likewise illustrate the same principle, namely, that a cause of action arises from the existence of a primary right in one person and a violation of that right by some delict on the part of another. Phillips had a primary right to bodily integrity. The delict was dropping the strongback on his ankle. Whatever was wrongful, be it negligence of the officers or anything else, made the dropping a delict. But the right plus its violation by the wrongful dropping, and not the cause of the dropping, is the cause of action.

Pavelka v. *St. Albert Society,* 82 Conn. 146.

Liimatainen v. *St. Louis River Dam & I. Co.,* 119 Minn. 238.

Beauregard v. *Webb Granite Co.,* 160 Mass. 201.

Emerson v. *Lewiston, etc., Ry.,* 116 Me. 61.

McKnight v. *Minneapolis Street Ry. Co.,* 127 Minn 207.

Beauregard v. *Webb Granite Co., supra,* was a suit under an employers' liability statute. Clause 1 of Section 1 of the statute made the employer liable for injuries from defects in machinery; clause

2 made the employer liable for negligence of the superintendent. The declaration was in two counts, alleging liability under both clauses. The plaintiff was compelled to elect between the counts by the trial court, which the Supreme Judicial Court held to be error, saying (p. 202):

> There are not two causes of action, but only one, and the two counts state the different legal reasons why under the statute the defendant may be liable in damages for the death of Clement Beauregard.

In *Pavelka* v. *St. Albert Society, supra,* the plaintiff brought successive suits claiming wrongful expulsion from a society. In the two suits different grounds of alleged wrongfulness were set up. The court held that the first suit made the matter *res judicata*, saying (p. 147):

> A right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant. * * * The wrong complained of in both actions was the act of wrongful expulsion, and it was the same act in both cases. * * * Its wrongfulness might result from a sufficient single cause, or from a concurrence of causes each sufficient in itself. However this might be, the essential thing necessary to perfect a right of action would be the wrongful character of the act of expulsion. The conditions creating that character would be only incidental facts evidential of the principal fact

upon which alone the plaintiff could rely, and upon which in both cases he did rely.

In *Pomeroy on Civil Remedies* (3rd Ed.), sec. 455, it is said:

> These suggestions are necessary to guard against the mistake of supposing that a distinct cause of action will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act of wrong, which, in connection with others, may make up the composite but single delict complained of.

In *Columb* v. *Webster Manufacturing Co., supra,* the Circuit Court of Appeals for the First Circuit, at 84 Fed. 595, gave a conclusive reason against the decision which this Court is asked to review.

> Suppose the plaintiff had recovered in his New Hampshire case, upon such description of the negligence as he employed there; could he, by varying his description, and alleging additional negligence contributing to the same accident, have another recovery of damages for the same injury? If the affirmative is asserted, how are the damages to be divided? How much for the negligence as first described, and how much for the negligence set out in the second description? It is not believed that any one would seriously insist upon the right of a second recovery. If it is conceded, then, that under such circumstances a second recovery could not be had, for the reason that the full right of recovery was involved in the description of

> the defendant's negligence which the plaintiff employed, and in the trial, and therefore merged in the judgment favorable to the plaintiff, upon what logic can it be urged that the full right of recovery is not merged in a judgment unfavorable to the plaintiff, which is based upon the same allegations, the same trial, and the same proofs? A rule which would make the question whether a judgment is conclusive upon the plaintiff depend upon the question whether the judgment is for or against him, and make the result of the trial a conclusive estoppel upon both parties if favorable to the plaintiff, and otherwise not, would be a one-sided rule, discriminating in favor of the plaintiff, and a rule which would at once destroy the fundamental idea of estoppel by judgment.

So here, if Phillips had recovered upon a finding that the gear was unseaworthy, could he recover anew for the same injury upon a finding that the gear was negligently operated? If these are separate causes of action, surely he could. Yet, to state the question is to answer it in the negative.

II

Troxell v. Del., L. & W. R. R., 227 U. S. 434, does not support the decision of the lower court

In the *Troxell case*, a widow on behalf of herself and her minor children, sued for wrongful death under a Pennsylvania statute and recovered judgment (180 Fed. 871). This judgment was reversed by the Circuit Court of Appeals (183 Fed. 373)

upon the ground that the defendant's appliances were proper.

She then, as administratrix, sued under the Federal Employers' Liability Act. The lower court refused to strike off a plea of *res judicata* (185 Fed. 540); however, as appears from the record, the case was allowed to go to the jury, which brought in a verdict for the plaintiff. The Circuit Court of Appeals, although holding that the remedy under the Federal statute was exclusive, held that the matter had been made *res judicata* by the first suit. (200 Fed. 44.) Upon writ of error this Court reversed the Circuit Court of Appeals. (227 U. S. 434.) Mr. Justice Day, speaking for the Court, said at p. 441:

> In the Circuit Court of Appeals, however, it was held that the judgment in the first case was a bar as to the second proceeding because, in view of the decision of this court in *Second Employers' Liability cases,* 223 U. S. 1, an action of this kind for injury to one engaged in interstate commerce could only be maintained under the Federal Employers' Liability Act; and that, although the plaintiff undertook in the first action to abandon the charge as to the negligence of fellow servants and relied only on the want of a proper derailing switch on Albion Siding No. 2, nevertheless the first judgment was a bar because in the second action she was merely offering to prove additional facts which might have been proved in the first trial.

We think it is apparent from what we have said that the first case was prosecuted and tried on the theory that it involved a cause of action under the state law of Pennsylvania. It was so submitted to the jury, and they were told that they were not to consider the Federal law, but recovery should be based upon the right under the state act. If the Circuit Court of Appeals was right in its second decision that no action could have been maintained under the state law, in view of the Employers' Liability Act, the fact that the plaintiff attempted to recover under the law and pursued the supposed remedy until the court adjudged that it never had existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled. *Wm. W. Bierce, Limited,* v. *Hutchins,* 205 U. S. 340; *Snow* v. *Alley,* 156 Massachusetts, 193, 195; *Water, Light & Gas Co.* v. *City of Hutchinson,* 90 C. C. A. 547, 551. Whether the plaintiff could properly have thus recovered is not the question now before the court. To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of

> the fellow servants of the deceased. This was the issue upon which the case was submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit.
>
> Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. * * * We think that under the ruling in the *Birch Case* there was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action.

Therefore, in the *Troxell case,* this Court decided three propositions:

(1) That pursuit of a nonexistent remedy did not make the matter *res judicata* when the existent remedy was pursued. This is not applicable to the instant case, because the same remedy was existent and was pursued in the Baltimore suit. *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375. Error therein must be corrected by appeal, not by collateral attack.

(2) That the plaintiff was not estopped by the judgment in the first suit as to matters not tried because not admissible therein. In the first suit

under the Pennsylvania statute, there could be no recovery for injury by negligence of the fellow servants, so that evidence thereof would not show a ground of liability. Under the Federal statute, there could be recovery for injury by negligence of the fellow servants, and, since the first suit had not concluded plaintiff's right of action, the plaintiff was not estopped to show negligence, under the familiar rule of this Court in *Cromwell* v. *County of Sac,* 94 U. S. 351. This proposition is not applicable to the instant case, because *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, shows that there could have been recovery for injury by negligence of the officers, so that such negligence was an admissible issue in the first suit. Therefore Phillips could not bring a second suit. *Columb* v. *Webster Manufacturing Co., supra; Miller* v. *Spokane International Railway Co., supra.*

(3) That there was a difference in parties between the widow in her own right and the widow as administratrix. Such difference in parties does not exist in the instant case. It involves two pursuits of the same remedy, for the same wrong, between the same parties, successively brought in two different courts.

However, it is respectfully submitted that there is no warrant in the *Troxell case* for saying, as Judge Hand does, that this Court held it to be one cause of action not to furnish safe cars and another to use safe cars carelessly. In the *Troxell case* the

plaintiff thought she had two remedies; she pursued one until it proved to be nonexistent. As to matters not in issue in the vain pursuit, the plaintiff was not estopped in her only existent remedy. This Court did not say, and has not said, that under the same statute there could be two causes of action for the same injury, and *Miller* v. *Spokane International Railway Co., supra,* under the statute, and *Columb* v. *Webster Manufacturing Co., supra,* at common law, decide that there is only one cause of action.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

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